

TOWARD THE HUMANISTIC STUDY OF LAW

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LAW schools are in trouble with their students. They are not able to interest, inspire, or even hold on to many of their best college graduates. It is true that for most students the first year is exciting. The fresh incisiveness of approach, the active classroom, the impatience with fuzzy college ways are a great experience. But after the first year the excitement fades. Students cannot find courses they want to take. Having caught on to the classroom method, they drowse through increasingly obvious repetitions. They try to find new interest outside the classroom in legal aid, practice trials or law journal work. All too often law school ends with students merely marking time.

Law schools are also no longer attracting as many of the best and most imaginative college graduates. College students today value the intellectual life more than their predecessors. They like courses which are searching and speculative; law seems to them to require a narrow confinement of the intellect. College graduates are increasingly idealistic, and increasingly skeptical about the commercial society in which they have grown up. They regard the legal profession as an adjunct of business, and lawyers as hired special pleaders for the established values. Moreover, students reject a role as a gun for hire — a secondary being. Many come to law school with no real intention of practicing law, hoping that they can find a career in public service or teaching; some of the top students will not even interview the large firms.

Doubt and self-criticism are certainly not new to the law schools. But the doubt and self-criticism have not been deep enough, and the many attempts at reform have not succeeded. Law schools must keep seeking new answers, or see their position of leadership gradually lost.

I

Many of the ills of legal education are symptomatic of the fact that it is primarily professional in orientation, although it should also be preparing students for lives of public service and scholarship. This confusion of goals is tacitly recognized, and an appearance of unity is maintained by the theory that all three are accomplished by the law schools' special way of training the mind. But the unity rings false, and the schools do not accomplish all that they undertake.

The most important aspect of training for practice is methodology and approach. When the practitioner confronts a new problem, he rarely depends upon what he learned in law school. Subjects are too specialized and technical, too rapidly changing. The practitioner prides himself on his ability to become familiar with any area of law, no matter how new to him, in the course of working on a single case. His stock in trade consists of the ability to analyze and organize facts, the ability to communicate, argue and explain, knowledge of research and writing methods, and a free-wheeling mind. After about one

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year, the law school has done almost all it can to equip the student in this style; the rest must be learned on the job. If the courses are to be of any value, they must offer something different.

But the courses in law school, although superbly adapted to the teaching of methodology, are far less effective when they try to accomplish other goals. In the first place, the materials of most courses — opinions of appellate courts — are well suited to logical analysis but inevitably have little depth or variety of outlook. Second, where modern casebooks have attempted to introduce materials from other disciplines, they have done so at a level that is so elementary and piecemeal that it has little value. Casebook social science usually consists of truncated excerpts from secondary sources, inserted into the notes in small type. Even where a law school offers courses dealing expressly with the social sciences and taught by experts in the field, the courses may turn out to be elementary at best. Third, the law school curriculum requires the student to consider a large number of complex issues in such haste that the result can only be superficial. Sixteen weeks of constitutional law allots only a few hours each to such immense questions as the limits of national power, federalism, the political role of courts, and the many problems of individual liberty. At best, such courses merely alert the practitioner to "where the issues are." Fourth, almost all these courses deal with their subjects at the same intellectual level of inquiry.

Law schools do little to encourage students to use initiative in educating themselves. Students are not really treated as adults. They are made to feel that they are beginning their education all over again, and the classes put very little emphasis upon individual work and thinking. The students get caught up in examinations, grades, and class ranking. In many ways the LL.B. program is undergraduate, not graduate education.

Even when law schools undertake to grant advanced degrees, the educational program remains at much the same level. Certainly there is no graduate training in law in the same sense that there is in the social sciences. Graduate degrees in law do not have the status of graduate degrees in other fields. The major law schools hire men for their own faculties without any concern for whether they have had graduate training in law, and a large number of the most respected professors of law have only a bachelor's degree.

In sum, despite many reforms, in spite of the language of expansive law school catalogues, in spite of widespread recognition of the need for further change, law school education in fact continues to reflect primarily the needs of the profession as the profession is now constituted. When these needs are met, there is little to hold even the professionally minded student. For the more uncommitted student, law school's procession of torts, contracts and procedure passes with little meaning.

II

What can the law schools do? I believe that their failure is primarily the result of the fact that they do not teach law as a subject matter. In other areas

of graduate education, methodology is kept secondary to the subject matter itself. This is the law schools' missed opportunity. The underlying subject matter of law is as interesting and intellectually exciting as any branch of human knowledge. Legal institutions are among the most primitive and basic in any society. Law deals with human beings in their moments of greatest stress and in their most profound conflicts with each other and with society. The study of such institutions, and such questions, could have endless challenge. Surely the law schools can try to teach at least a few of their courses in this way.

In property, for example, a great question concerns the nature and functions of the concept or institution called ownership. This question is present, if not always articulated, in the discussion of the chief topics with which the course in property is now concerned: how much one person can limit another's rights of ownership by private volition; how much ownership can be split between different persons such as landlord and tenant; to what extent the state may take ownership for public use, and with what compensation; and what forms of wealth should be accorded legal protection as private property. If property were studied in depth, the problem of ownership would lead to a series of truly searching questions. What does "ownership" mean in our society? Ownership consists of a varying bundle of elements, and the problem is which of these go to the core of ownership, and which are only peripheral. What functions does the concept of "ownership" perform, and what values does it embody? Ownership can protect such diverse values as privacy, individual decision making, differences in taste, family succession, social status and pluralism in the political sense. Where should the line between the individual owner and the state be drawn, not in terms of vague constitutional formulas, but in terms of the underlying values at stake? It would be necessary to know the impact of the legal institution of "ownership" on individual human beings, and on society. Finally, how is the institution of property and ownership changing, and how ought it to change?

The study of ownership would necessarily have to draw on many fields. Among these might be anthropology, history — particularly the history of the institution of property, philosophy in general and political philosophy in particular, the ownership systems of other countries, social science information about the effects of ownership and non-ownership on character and behavior. The psychology of property would furnish both an explanation and a critique of much law; what men try to own and why; what needs they seek to satisfy through property; how these drives shape those who are possessed by them. Finally, in studying ownership students would encounter what is now regrettably omitted from most law schools: the richness, complexity, and imaginativeness of the common law, set in its historical background, with close attention to the infinite artistry of its detail. Such a course need not and should not become the watered down study of philosophy or history or social science. The focus and object of study would remain questions that are uniquely legal. But it would be law in greater depth, intensity and excitement.

A second course which needs greater depth is criminal law. Criminal law presents profound issues. How is blame to be divided between the person who commits an act and the persons and environment which laid the groundwork for the act? What is the meaning of free choice in light of the objectives of the criminal law and the knowledge supplied by psychiatry? Where shall "objective" standards of responsibility be set in terms of ability to resist temptation, ability to foresee risks, or ability to control the behavior of others? Such issues have long been the subject of intense thought and debate by philosophers, and in many ways their thinking about these problems is more advanced and sophisticated than that of lawyers. The basic issues of the criminal law are also treated with much insight in many works of literature. One could profitably read such diverse authors as Hawthorne, Melville, Dreiser, Kafka, Camus and Dostoyevsky, to say nothing of Shakespeare and the Bible, for their many different ways of looking at the law. Sartre's play "The Flies" is a more searching study of responsibility than any of the cases I have read. Criminal law is an area where the blackletter is relatively straightforward and easy, but the problems involved in the creation of standards are profound. This is a job which our society has assigned to lawyers. Philosophy and literature would aid the student lawyer to develop some part of the understanding needed for this almost superhuman task.

It hardly needs mention that criminal law also requires the insights of psychiatry and psychoanalysis. To a large extent law and psychiatry have talked past each other despite the growth of sophistication in both disciplines. In the sense of genuine communication, psychiatry and criminal law is still an untouched field.

Administrative law is a subject which is utterly unintelligible, even in the most narrowly "legal" terms, unless the student is able to see more than the cases. Agencies, and cases concerning them, are inseparable from history. Much legal doctrine can be judged only in economic terms. More important still, the whole object of the administrative process is to perform the vital and complex work (common to both the modern democratic and the socialist state) of planning and allocation. Our administrative agencies are our chief instruments of domestic social policy, more important even than Congress, and our chief distributors of wealth from public sources. When an agency decides where a highway is to be located, who shall be licensed to broadcast over a television channel, or whether a dam shall be built across a river, it is engaging in planning and allocation of major importance. In a democratic country, it is vital that all affected persons be heard, that all points of view be aired, that all competing interests be considered. How to accomplish this, and still get decisions made, is the great dilemma of planning and allocation. Unless this underlying process is studied in its own right, the judicial and agency opinions can only be wordy and baffling collections of formulas and criteria, signifying nothing.

If the curriculum were revised to permit study of the subject matter of law in greater depth, a school could offer several courses of unusual length and in-

tensity — perhaps a two semester, ten hour course in property or criminal law. Readings would have to go far beyond casebooks. In part law schools stick to cases because the classroom method developed from cases is so effective; but that very effectiveness has now become a source of dependence and limitation. Ways must be found to be effective with other kinds of materials. Departure from cases would also mean that students would be compelled to do more original thinking. In the classroom they might be invited to criticize and contribute to the instructor's own ideas. On their own they might be asked to write papers requiring individual originality, rather than take examinations. Two short papers, each on a particular problem, would be far more worthwhile for student and professor than several standardized answers multiplied by fifty.

To teach such courses, law professors would need a broader education than most of them now have — not just a law degree plus a few years in practice, but some graduate study in the arts and sciences, or perhaps a new type of graduate course in law. An increasing number of young teachers are now seeking a broader education. Pending the millennium when such education is general on faculties, law schools could continue to appoint to their faculties scholars in fields other than law, and to permit students to take a wide variety of relevant courses in other branches of the university.

III

Law school education cannot exist for its own sake. It is not possible to talk about innovations in legal education without talking about them in relation to lawyers' work. And it is when we consider the changing nature of the legal profession that the real need for educational change becomes apparent.

The study of law in greater depth could, of course, be justified by even the narrowest view of the profession. It could be justified merely as a way to maintain interest during the second and third years which are now so barren. It could be justified as offering the practitioner greater insights and a wider ranging mind, without loss of anything now found in law school. It could be justified in terms of preparing teachers and scholars. And it would be particularly helpful in terms of lawyers going into public service. Government policy-makers trained as lawyers are susceptible to becoming trapped in their own logic. They may operate wholly from within a logical system the basis of which (quite possibly mistaken) they do not question. And lawyers tend to be know-it-alls who believe no other branch of human knowledge is beyond their grasp. Men who "think like lawyers" can rigidify the operations and the thinking of government. Education which teaches the lawyer tight logic but then gives him enough spaciousness to free himself of that logic would in the long run greatly benefit a government dependent on lawyers to run its affairs.

But the most important reason for a new approach to the study of law is not simply to improve the present job of educating scholars, public servants, and practitioners as that job is now conceived. The ultimate justification for curricular revision, or rather the necessity, comes from the fact that the role of

law in society has changed and is changing, and hence the role of lawyers must change.

Law now permeates every activity. This trend is inevitable as society rapidly becomes more institutional and bureaucratic. Today's social problems necessarily become legal problems. Thus, poverty is primarily a legal problem, since in a country of great wealth it is a problem of distribution, not a problem of producing more goods.

As a result of these changes, law in recent years has been called upon to serve many new causes. The civil rights movement used law as its primary instrument in a drive for fundamental social change. Many other groups concerned with protest or change have adapted civil rights techniques to their own objectives. The nation's awareness of the problems of poverty has revealed a need for lawyers in many new areas: defense of indigent criminals, protection of the poor in their dealings with private individuals (notably landlords), and assistance to the poor in confronting government (social welfare, public housing, education). The growth of governmental activity in economic affairs has brought law into many new areas of business and individual activity, and lawyers caught in the toils of the administrative process recognize the urgent need for a fresh approach to this unmanageable area.

Until very recently, the legal profession has narrowly limited its scope. Lawyers have traditionally concerned themselves with only one sector of the world in which law now operates, the sector of commerce. For most of them, day-to-day law has meant business law. Other problems have clustered around the business core, but these have also tended to be commercial in nature. Today, however, it is vitally necessary that lawyers actively participate in all of the areas of society in which law now plays a role. Their work may start with business, but it should range over criminal law, public housing, social welfare, unemployment, problems of the mentally ill, urban town and country planning, economic planning both local and national, civil rights, civil liberties, all forms of protest movements, and international law. In their private capacity they should be available to help all those individuals and groups who come in contact with law. They should learn to represent the various interest groups, constituencies and minorities in society — to help them develop points of view, speak for them, and interpret the world to them. That is the true scope of the practicing lawyer's calling.

In his public capacity, the lawyer's responsibilities are even greater. Every year government gets more vast and complex tasks to perform, and every year the government seems less able to cope with them. There are experienced men in the bureaucracy who believe that one day government will simply stop running altogether. That is almost what has happened with respect to decisions concerning television, dams, airline routes and highways. No profession has emerged to manage the affairs of government, which still remains the last great playground for amateurs, part timers and fortune seekers. Only lawyers can be the professionals of public life.

Moreover, policy making for public affairs must take on a new character. Most of our planning and policy making has been of the ad hoc, hand to mouth, empirical variety so congenial to lawyers. This has not been good enough. Planning must be based on a broader, more speculative philosophy, and keyed to longer range goals. Ultimately the role of the public lawyer must change very basically, so that he engages in a type of intellectual work far different from his usual day to day activism. It is for this that legal education must now equip him.

It is important to recognize explicitly that whether he is engaged publicly or privately, the lawyer will no longer be serving merely as the spokesman for others. As the law becomes more and more a determinative force in public and private affairs, the lawyer must carry the responsibility of his specialized knowledge, and formulate ideas as well as advocate them. In a society where law is a primary force, the lawyer must be a primary, not a secondary, being.

All of this leads to the law schools' greatest responsibility and opportunity. Today we lack — and desperately need — a profession concerned with the overall structuring of society. Where most areas, even philosophy and the social sciences, have become increasingly specialized, students of law have, of necessity, remained generalists. This is so because law touches all areas of life, and because it touches life in a prescriptive sense — by the setting of standards — and thus it unavoidably treats of society as it ought to be. Hence the study of law as a subject matter must be a study of society in the moral sense of ought and should. Herein lies law's true kinship with literature and with the other arts which seek a critique and an overview of society. Herein lies law's responsibility to be, not merely in apostrophe but in reality, the queen of the humanities.

Today's youth have high ideals for themselves and for their country. Their vision of a good life includes the life of the mind and the senses; it includes service to the oppressed and the disinherited; it includes a deep and abiding humanism.

Perhaps those idealistic students who now shun law schools and the legal profession are quite right; they would find little place for themselves in the present day profession. And it is not the object of this article to lead them to think otherwise. Change will be very slow in coming, and probably will not occur in time to offer careers to students now in college.

But ultimately the law does offer, more than any other way of life, what they are looking for. With only their idealism the new generation can have little impact. Law can arm them. Through law they can aid in the constant reform and adaptation of society. Through law they can help to keep impersonal organization from overwhelming the basic human values. And in law they can find a life that is richly creative. Law can be the intellect and the sword of this new generation, and through them, more than ever before, the servant of man.